Filed 8/20/04 P. v. McLaughlin CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARCUS MCLAUGHLIN, Defendant and Appellant.	E034379 (Super.Ct.No. RIF 096334) OPINION

APPEAL from the Superior Court of Riverside County. Robert J. McIntyre, Judge. Affirmed.

David H. Goodwin for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Anthony Da Silva and David Delgado-Rucci, Deputy Attorneys General, for Plaintiff and Respondent.

1. Introduction

A jury convicted defendant, a California lawyer, of violating Financial Code

section 17200,[1] for operating an escrow office without a license. The court sentenced defendant to one year one day in prison and five years on probation.

Defendant contends the court committed evidentiary and instructional errors and errors relating to the defenses of mistake of law and mistake of fact. Defendant also accuses the prosecutor of misconduct. We hold there was no prejudicial error and affirm the judgment.

2. Facts

Defendant admitted that he operated an escrow office without a license because he thought that, as an attorney, he did not have to be licensed.

In 1996, defendant took over the operation of an existing escrow office from another lawyer. At that time, defendant conducted his own research and contacted the State Bar, the Department of Corporations, and the Department of Real Estate about whether a license was required. He concluded lawyers were exempt from licensing requirements. Defendant created an escrow division, separate from his law firm. He believed the escrow instructions created an attorney-client relationship and that he owed a fiduciary duty to the escrow clients. When the law changed, defendant thought there was a "grandfather" exception for an existing escrow office operated without a license by an attorney.

Defendant testified in a deposition that he handled hundreds of escrows for a fee of $300 per escrow. He did not obtain a bond for the escrow business. He said the

[1] All statutory references are to the Financial Code.

"escrow clients" were not legal clients. He believed he could operate an escrow business under his bar card number.

Over defense objections, two people testified at trial they had lost money in escrows handled by McLaughlin's escrow office. People also testified defendant was not their attorney when they used the escrow company.

An attorney, Dean Cloud, testified that escrow instructions regarding interpleader did not create an attorney-client relationship.

3. Evidence of Losses to Escrow Clients

Section 17200 provides: "It shall be unlawful for any person to engage in business as an escrow agent within this state except by means of a corporation duly organized for that purpose licensed by the commissioner as an escrow agent." Section 17200 has been the same since 1961.

Section 17006, as enacted, originally provided an exception to allow an attorney to act as an escrow agent: "This division does not apply to: [¶] . . . [¶] Any person licensed to practice law in California who is not actively engaged in conducting an escrow agency." It was amended in 1999 to provide: "This division does not apply to: [¶] . . . [¶] Any person licensed to practice law in California who has a bona fide client relationship with a principal in a real estate or personal property transaction and who is not actively engaged in the business of an escrow agent." Under both versions, an attorney could not be "actively engaged" as an escrow agent. Nevertheless, defendant tries to lay claim to the limited exception permitting an attorney to act as an escrow agent.

On appeal, defendant cites the authority that when the issue in a case is the absence of a license, or some other status or condition, the issue of damages is irrelevant because the absence of a license is not the cause of the damages. (*Lehmuth v. Long Beach Unified Sch. Dist.* (1960) 53 Cal.2d 544.) Defendant also claims the court committed instructional error regarding this evidence because it did not tell the jury the evidence of loss was not relevant to prove a violation of section 17200. Defendant reasons the evidence was "emotionally charged" (*McKinney v. Rees* (9th Circ. 1993) 993 F.2d 1378, 1385) and inescapably prejudicial, causing error under either *Chapman v. California* (1967) 386 U.S. 18 or *People v. Watson* (1956) 46 Cal.2d 818, 836.

Evidence about the lack of a bond was properly admitted because it had some bearing on the primary contention that defendant did not comply with the license requirement. It suggests defendant did not heed any of the legal requirements for operating an escrow business.

But we do not agree with the Attorney General's position that the trial court did not abuse its discretion under Evidence Code section 352 by admitting evidence about the escrow losses. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1303, citing *People v. Green* (1980) 27 Cal.3d 1, 19, overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.) The Attorney General argues the losses serve to show no attorney-client relationship existed because "an attorney would be required to take the interests of his client into account." This explanation does not make much sense. The losses could still have occurred, even if defendant was the victims' attorney, because the escrow

employees, not defendant, were stealing the money. The losses connote nothing about whether defendant was the victims' attorney.

Prejudice, however, was not demonstrated by 20 lines of testimony about two bounced checks in a six-day trial that generated a 600-page reporter's transcript. Although the court did not give the jury a limiting instruction, the prosecutor told them to disregard the evidence about losses for the purpose of deciding guilt. Furthermore, the evidence was so slight as to have virtually no impact at all.

4. The Defenses of Mistake of Law or Mistake of Fact

Defendant maintains he acted under a mistake of law because, in 1996, he was advised by various state agencies that he could operate an escrow business without a license. (*People v. Ferguson* (1933) 134 Cal.App. 41.) The denial of the right to present this defense also compromised his due process rights to counsel (*Mason v. State of Arizona* (9th Cir. 1974) 504 F.2d 1345, 1351) and to a jury determination of his guilt or innocence. (*People v. Mizchele* (1983) 142 Cal.App.3d 686, 691, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 302 and *Washington v. Texas* (1967) 388 U.S. 14, 19)

One problem with defendant's argument, as identified by the Attorney General, is that, even if defendant relied upon information obtained in 1996, he is not absolved from the consequences of a change of the law in 1999. There is no evidence that he was assured later that a grandfather clause allowed him to continue to act as an escrow officer. Therefore, there was no mistake of law.

Furthermore, defendant is misguided in his attempt to rely on cases involving sex offender registration (*People v. Garcia* (2001) 25 Cal.4th 744) and filing fraudulent tax

returns. (*People v. Hagen* (1998) 19 Cal.4th 652.) As discussed in respondent's brief, those cases concern crimes factually and legally distinguishable from the offense in the present case in which "willfulness" is not an element of the crime.

For the same reasons, there was no defense of mistake of fact and no error made by instructing the jury that only the 1999 law should be considered.

5. Prosecutorial Misconduct

Defendant claims the prosecutor committed misconduct by referring to the losses suffered by escrow clients and thereby appealing to the jury's passion and sympathy. Defendant complains particularly about the prosecutor attempting to ask defendant whether he had lost a related civil suit and insinuating that defendant may have engaged in other wrongs than failing to be licensed. Defendant also accuses the prosecutor of two instances of badgering the witness by shouting at him and by asserting "you really didn't answer my question."

As stated in *People v. Ochoa* (1998) 19 Cal.4th 353, 427, citing *People v. Samayoa* (1997) 15 Cal.4th 795, 841: "'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citation.] As a general rule a defendant may not

complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant [requested] an assignment of misconduct and [also] requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.'"

The behavior complained of by defendant does not satisfy these standards. Even if the trial court erred by admitting the slight evidence of the escrow losses, the prosecutor warned the jury not to consider it in determining defendant's guilt. Nor do we accept defendant's contention that a victim who is 70 years old is so "elderly" that he inspires ipso facto extraordinary sympathy in the jury.

Defendant objected and the trial court sustained the objection to the prosecutor's question about defendant losing a civil suit. The jury received the standard instruction about not using for any purpose a question or answer to which an objection is sustained. It is presumed, absent other evidence, that jurors followed this instruction. (*Weeks v. Angelone* (2000) 528 U.S. 225, 234.) Therefore, any misconduct was not prejudicial error.

As to the badgering claim, both instances occurred close together (on two successive pages of the reporter's transcript) and the court sustained defense objections, curing any error. (*People v. Jones* (1997) 15 Cal.4th 119, 168, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 803.) No prejudicial misconduct occurred.

6. Disposition

No prejudicial error and no cumulative error occurred. We affirm the judgment.

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s/Gaut
J.

We concur:

s/Hollenhorst
Acting P. J.

s/Ward
J.